THE FEDERAL EMPLOYERS' LIABILITY ACT.*

4. When Railroad or Employee Engaged in Interstate Commerce (Continued).—Employees Engaged upon or

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about Ferryboats or Other Vessels Operated by Railway Companies.—The statute does not limit the liability of the carrier to its track or train service, but expressly refers to defects or negligence in boats, wharves, and other equipment, provided they and the injured party are engaged in interstate commerce. The maintenance of a ferry may be within the charter powers of a railroad company, and although it can not be said that the voyage is a carriage by rail, the Act of April 22, 1908, as amended by the Act of April 5, 1910, applies to servants of an interstate railway employed upon a ferryboat owned by such carrier and operated in interstate commerce in connection with its railroad.[1]

Where No Interstate Freight or Passengers Actually Carried on the Particular Trip.—In conclusion of this part of the discussion it is well to note that the running of a train from one state into another for the purpose of transporting freight or passengers across the state line constitutes interstate commerce, even though it does not appear that any freight or passengers were actually carried across the state line upon that particular trip. In other words, the mere operation of the train for the purpose of transporting freight or passengers across the state line, if offered, constitutes interstate commerce.[2]

H. Enforcement of Act—1. Cause of Action Given by Act—a. General Nature; Survival of Action.—The first

1. **Employees upon ferryboats, etc., operated by railway company.**—The Passaic (D. C.), 190 Fed. 644, 649.

Employee unloading coal from car to boat for purpose of transshipment.—As to the case of a yard brakeman, injured while engaged in handling his brake in the process of unloading, through the device of an unloading machine, a carload of coal in transit from Pennsylvania to Wisconsin, the unloading being in connection with the transshipment from car to boat incidental to such through shipment, see the case of Erie Ry. Co. *v.* Kennedy (C. C. A.), 191 Fed. 332, in which it was assumed without controversy that he was engaged in interstate commerce within the meaning of the federal act at the time of his injury, the defendant insisting, however, that the plaintiff had not stated a case within the act because not specifically basing his action thereon.

2. **Where no interstate freight or passengers actually carried on the particular trip.**—Kansas, etc., R. Co. *v.* Cook, 100 Ark. 467, 140 S. W. 579.

section of the Act of April 22, 1908, omits any provision on the subject of the survival of the right of action given the injured employee, but, in case of the death of such employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. Hence, as the act stood prior to the enactment of § 9, it was held under the common-law rule, that, upon the death of the injured employee, the right of action given him died also, and that there could be no recovery of damages for his conscious suffering in an action for his death.[3] Moreover, the cause of action being given by a federal statute, there could be no recourse to state statutes in order to determine whether it survived or not. It could not be pieced out by resorting to the local statutes of the state in which the proceeding was had or in which the injury occurred; the question of survival not being one of procedure, but one which depends on the substance of the cause of action.[4]

It is true that Rev. Stat., § 955 (U. S. Comp. Stat. 1901, p. 697), provides that: "When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment." But this section does not itself provide what causes of action shall survive, but, in the absence of any other controll-

3. **General nature of action; survival.**—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 67, Adv. S., 57 L. Ed. 192, 33 S. Ct. 192; St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. S., 57 L. Ed. 703, 33 S. Ct. —; American Ry. Co. *v.* Didricksen, 227 U. S. 145, 57 L. Ed. —, 33 S. Ct. 224, 225; St. Louis, etc., R. Co. *v.* Scale, 229 U. S. —, 33 S. Ct. —, Adv. S., 57 L. Ed. 651, 652; Fulgham *v.* Midland Valley R. Co. (C. C.), 167 Fed. 660; Walsh *v.* New York, etc., R. Co. (C. C.), 173 Fed. 494; Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002, 1003; Cain *v.* Southern R. Co. (C. C.), 199 Fed. 211.

4. **Same—Not aided by recourse to state statutes.**—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, Adv. S., 57 L. Ed. 192, 33 S. Ct. 192, 194; Walsh *v.* New York, etc., R. Co. (Mass.), 173 Fed. 494. See, also, Schreiber *v.* Sharpless, 110 U. S. 76, 80, 28 L. Ed. 65, 3 S. Ct. 423; Baltimore, etc., R. Co. *v.* Joy, 173 U. S. 226, 230, 43 L. Ed. 677, 19 S. Ct. 387; United States *v.* De Goer (D. C.), 38 Fed. 80; United States *v.* Riley (D. C.), 104 Fed. 275.

ing statute, leaves the matter to the common law. As to cases arising under the Act of April 22, 1908, as originally enacted therefore, the case stood that the state statutes relating to survival were inapplicable; there was no general federal statute; and the particular statute in question, the Act of 1908, said nothing about survival. Thus remitted to the common law, at which survival is out of the question, the courts were compelled to hold that the cause of action did not survive.[5]

Such survival of the injured employee's right of action was expressly provided for by § 2 of the later amendatory Act of April 5, 1910 (36 Stat. 291; c. 143 [U. S. Comp. St. Supp. 1911, p. 1325]), adding § 9 as a new section to the Act of April 22, 1908. This, however, was held not to enlarge the measure of recovery in cases arising under the act previous to the amendment, but they were still controlled entirely by provisions of the Act of 1908.[6]

Clearly the sole purpose of adding § 9 was to provide for the survival of the action upon the death of the injured employee, since by that section the person who must bring or continue the action is the same, and the beneficiaries the same, as provided by the act before it was added.[7] The only difference is that since the addition of § 9, damages, in case the injury results in death, may now be recovered for the injury and suffering sustained by the employee as well as for his death, and for the benefit of the beneficiaries named,[8] and not for the benefit of his estate as intimated in previous cases.[9]

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5. No survival under act as originally enacted.—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, Adv. S., 57 L. Ed. 192, 33 S. Ct. 192, 195; Fulgham *v.* Midland Valley R. Co. (C. C.), 167 Fed. 660; Walsh *v.* New York, etc., R. Co. (C. C.), 173 Fed. 494, 495; Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002.

6. Survival under amended act—Cases previously arising.—St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. S., 57 L. Ed. 703, 704, 33 S. Ct. —; Cain *v.* Southern R. Co. (C. C.), 199 Fed. 211, 212.

7. Sole purpose of § 9 to provide for survival.—Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002.

8. Same—Effect as to damages recoverable.—Northern Pac. R. Co. *v.* Maerkl (C. C. A.), 198 Fed. 1.

9. Same.—See St. Louis, etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874, 881; Fulgham *v.* Midland Valley R. Co. (C. C.), 167 Fed.

Only One Recovery for Same Injury.—It is expressly provided by § 9 that there shall be only one recovery for the same injury. Damages of both kinds, therefore, must be recovered in one and the same action. This is the plain meaning of the act.[10]

Not Limited to Cases Where Death Was Instantaneous.—It is hard to understand, even in the absence of the light since thrown upon the Act of 1908 by judicial decisions, how such a construction of the act could have been serlously contended for; and yet, in a case that went to the Supreme Court of the United States, counsel for the defendant railway company raised and argued the point, that the fact that the injured employee survived his injuries for several hours operated to extinguish the defendant's liability, not only for the wrongful injury, but for the death which ensued, on the theory that the act declared a single liability and gave a cause of action to the injured employee, if he survived the accident, or, in the event his death was instantaneous, and only in that event, a right of action for the benefit of the persons named in the act. In other words, the contention seems to have been that if the first-mentioned cause of action once arose, the second could never come into existence, and the death of the injured employee before institution of suit or recovery of judgment upon said first-mentioned cause of action operated to defeat all liability whatsoever. The Supreme Court refused to adopt this senseless and narrow view, and construed the act as giving a right of action, first, to the injured employee, which, prior to the Amendment of April 5, 1910, died with the person in case of death before recovery therein; second, a new and independent cause of action, springing up in favor of certain named beneficiaries in case of death before suit brought or recovery had upon the cause of action first mentioned.[11]

660, 664; Cain *v.* Southern R. Co. (C. C.), 199 Fed. 211, 212; Midland Valley R. Co. *v.* Le Moyne (Ark.), 148 S. W. 654.

10. Only one recovery for same injury.—Northern Pac. R. Co. *v.* Maerkl (C. C. A.), 198 Fed. 1, 6; Oliver *v.* Northern Pac. R. Co. (D. C.), 196 Fed. 432; St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. S., 57 L. Ed. 703, 704, 33 S. Ct. —.

11. Not limited to cases where death was instantaneous.—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. 192, 33 S. Ct. 192, 193.

b. To Whom Given.—In view of the plain provisions of the federal act giving the right of action to the personal representative of the deceased employee, it would seem that no question could have arisen as to the proper party to bring the suit in those cases in which the injury results in death; and yet several cases have arisen in which the action was attempted to be brought by the widow or next of kin, or some person other than the personal representative. By the decisions in these same cases it is now settled as thoroughly as any point could well be, that, as regards the proper party plaintiff, the federal act is exclusive of and supersedes all state and territorial legislation, and that in those cases in which the injury results in death the action must be brought or continued by and in the name of the personal representative, and no one else; and unless the action is so prosecuted, there can be no recovery under the federal act.[12]

Of course, where the heirs, next of kin, or other parties at interest consider that the injury occurred wholly outside the channels of interstate commerce and that the federal act is not applicable, they may proceed under the state law, and bring the action in the name of the widow, next of kin, or whoever may be the proper person designated by the state law to bring such action;[13]

12. **Action—Brought solely by personal representative in case of death.**—American R. Co. *v.* Birch, 224 U. S. 547, 557, 56 L. Ed. 879, 882, 32 S. Ct. 603; Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 576, 57 L. Ed. 135, 33 S. Ct. 135; Troxell *v.* Delaware, etc., R. Co., 227 U. S. 434, 443, 57 L. Ed. 274, 33 S. Ct. 274; St. Louis, etc., R. Co. *v.* Seale, 229 U. S. —, 57 L. Ed. 651, 652, — S. Ct. —, Mr. Justice Larmar, dissenting; St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. S., 57 L. Ed. 703, 704, 33 S. Ct. —; Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002; Oliver *v.* Northern Pac. R. Co. (D. C.), 196 Fed. 432; Kansas, etc., R. Co. *v.* Pope (Tex. Civ. App.), 152 S. W. 185; Rich *v.* St. Louis, etc., R. Co. (Mo. App.), 148 S. W. 1011; Gulf, etc., R. Co. *v.* Lester (Tex. Civ. App.), 149 S. W. 841; Dewberry *v.* Southern R. Co. (C. C.), 175 Fed. 307; Fulgham *v.* Midland Valley R. Co. (C. C.), 167 Fed. 660, 662; St. Louis, etc., R. Co. *v.* Geer (Tex. Civ. App.), 149 S. W. 1178, 1180; rehearing denied Oct. 12, 1912; Midland Valley R. Co. *v.* Le Moyne (Ark.), 148 S. W. 654.

13. **Same—Injuries occurring outside channels of interstate commerce.**—St. Louis, etc., R. Co. *v.* Seale (Tex. Civ. App.), 148 S. W. 1099.

but should it be shown by the declaration in such case, or developed in the evidence, that the injury occurred while the defendant and the employee were engaging in interstate commerce, the exclusive operation of the federal act would at once come into play, and no recovery could be had upon the action as brought.[14]

Thus in a case arising in the Federal Circuit Court for the Northern District of Georgia, the plaintiff sued as the widow of her deceased husband, who was killed in the employ of the defendant railway company. The suit was brought under the Georgia statute, which provides that a widow may recover for the homicide of her husband. The declaration disclosed the fact, however, that the deceased was running as an engineer at the time he was killed on a train engaged in interstate commerce; consequently, it was held that the action, founded on a state statute, could not be maintained.[15] And in a case arising in Porto Rico, where there existed a local employers' liability act when the federal statute was enacted, and which gave a cause of action under certain conditions to the widow of the deceased, or to his children or dependent parents, an action brought by the widow and only son of the deceased was held by the lower court to have been properly brought in the name of the only persons for whose benefit any recovery could be had, and that the federal act was not to be construed as requiring a surviving husband or wife, in the absence of any estate belonging to the deceased, other than his right to sue, to have an administrator appointed solely for the purpose of bringing the suit. In reversing the lower court on this point, the supreme court of the United States said:

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14. **Same—Where pleading or evidence shows case under federal act.**—St. Louis, etc., R. Co. *v.* Seale, 229 U. S. —, Adv. S., 57 L. Ed. 651, 652, 33 S. Ct. —; Troxell *v.* Delaware, etc., R. Co., 227 U. S. 434, 443, Adv. S., 57 L. Ed. 274, 33 S. Ct. 274; Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 576, Adv. S., 57 L. Ed. 135, 33 S. Ct. 135; American R. Co. *v.* Birch, 224 U. S. 547, 56 L. Ed. 879, 32 S. Ct. 603; Gulf, etc., R. Co. *v.* Lester (Tex. Civ. App.), 149 S. W. 841; Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002; Dewberry *v.* Southern R. Co. (C. C.), 175 Fed. 307; Rich *v.* St. Louis, etc., R. Co. (Mo. App.), 148 S. W. 1011; Kansas, etc., R. Co. *v.* Pope (Tex. Civ. App.), 152 S. W. 185.

15. **Same—Same.**—Dewberry *v.* Southern R. Co. (C. C.), 175 Fed. 307.

"But the words of the act will not yield to such a liberal construction. They are too clear to be other than strictly followed. They give an action for damages to the person injured, or, 'in case of his death, * * * to his or her personal representative.' It is true that the recovery of the damages is not for the benefit of the estate of the deceased, but for the benefit 'of the surviving widow or husband and children.' But this distinction between the parties to sue and the parties to be benefited by the suit makes clear the purpose of congress. To this purpose we must yield, even if we could say, as we can not, that it is not a better provision than to give the cause of action to those in relation to the deceased. In the present case it looks like a useless circumlocution to require an administration upon the deceased's estate, but in many cases it might be much the simpler plan and keep the controversy free from elements but those which relate to the cause of action. But we may presume that all contending considerations were taken into account and the purpose of congress expressed in the language it used."[16]

It is true, therefore, that under the federal statute a plaintiff can not, although he or she be the sole beneficiary, maintain an action except as the personal representative of the deceased.[17] By the same token, where an action brought by the personal representative of the deceased and based specifically upon the federal act can not be sustained under that act for the reason, among others, that it arose, if at all, prior to the passage of that act, neither can it be sustained under a state law which gives the right of action to the parents, even though it set out facts showing a cause of action under the state law, since damages to the estate of a deceased minor for which a personal representative might maintain an action would be a distinct cause of action from damages to his parents resulting from his death, and for which the state law gives a cause of action to the parents.[18]

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16. **Same—Action by sole beneficiaries where no other estate than mere right to sue.**—American R. Co. *v.* Birch, 224 U. S. 547, 56 L. Ed. 879, 32 S. Ct. 603, 606, followed in Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135, 137.

17. **Same—Same—Only personal representative can sue.**—Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135, 137; American R. Co. *v.* Birch, 224 U. S. 547, 56 L. Ed. 879, 32 S. Ct. 603; St. Louis, etc., R. Co. *v.* Seale, 229 U. S. —, Adv. S., 57 L. Ed. 651, 653, 33 S. Ct. —.

18. **Same—When action based on federal act proves to be governed**

Same—Pleading Facts—Amendment of Declaration or Complaint.—As previously stated, where the plaintiff is uncertain as to whether the injury occurred while the employee was engaged in intrastate or interstate commerce, he may plead the facts and then recover under either the state or federal law according as the evidence may develop, subject to the usual rules governing variances between the pleadings and proof. But from what has already been said, it at once appears that this does not solve the problem as to the proper party plaintiff in those instances in which the state law provides for the bringing of the action by a person or persons different from the person prescribed by the federal act, and that he must still face the danger of bringing the suit in the name of the party prescribed by the one act only to fail because of the evidence developing a case calling for the exclusive operation of the other. The proper recourse in such an event is to resort either to a nonsuit or to an amendment changing the relation in which the plaintiff sues to the relation prescribed by the statute, state or federal, as the case may be. That such an amendment is permissible has recently been held in a case decided by the Federal Supreme Court, in which it was held that the trial court, in the exercise of its authority under U. S. Rev. Stat., § 954, U. S. Comp. Stat. 1901, p. 696, may allow an amendment to the petition in an action brought by the sole surviving parent in her individual capacity, to recover damages from an interstate railway carrier for the death of her unmarried and childless son while engaged as its employee in interstate commerce, by which, for the first time, she set up the right to sue as personal representative, in which capacity alone can her action under the Act of April 22, 1908, be maintained.[19]

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by state law.—Winfree *v.* Northern Pac. R. Co., 227 U. S. 296, 57 L. Ed. - 33 S. Ct. —, affirming 173 Fed. 65.

19. **Pleading facts—Amendment as to party plaintiff or as to beneficiaries of suit.**—Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135.

See, also, a case arising under the Act of June 11, 1906, in which the plaintiff sued as widow of the deceased, and it was held that she might amend her declaration so as to change her relation to that of administratrix. Hall *v.* Louisville, etc., R. Co. (C. C.), 157 Fed. 464.

This right of amendment is subject, of course, to the limitation that it must not introduce or undertake to set up a new cause of action upon the facts.[20] In the case last cited, where the plaintiff sued first as heir at law or next of kin to recover for the death of her unmarried and childless son, basing her right to recover upon the state law, it was held that a mere amendment, by which, without stating any new facts as the ground of action, she set up for the first time the right to sue as personal representative, was not equivalent to the commencement of a new action for the purpose of applying the two years' limitation prescribed by the federal act, and that her pleading was not vitiated by the reference to the state law any more than it would have been by a reference to any other repealed statute.[21] But in the Hall case, cited in the note as arising under the Act of June 11, 1906, where it appeared that the state law gave the right of action to the widow, when there was one, for her sole benefit, whereas the federal act gave such right to the personal representative alone and for the benefit of the widow and children or dependent next of kin, it was held that the action brought in the state court, and in the plaintiff's capacity as widow, was necessarily based upon the state law, and that the amendment of the declaration, changing the capacity in which she sued to that of administratrix, necessarily introduced a new and different cause of action based on the federal statute, and was, in effect, the bringing of a new action thereunder, which, for the purpose of limitation, must be considered as having begun when the amendment was filed, and did not relate back to the time of the commencement of the original action.[22]

The Supreme Court of the United States itself has made some very close distinctions as to what constitutes a new and distinct cause of action in such cases, distinctions that it is not always

20. Same—Limitations of right of amendment.—Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135, 137.

21. Amendment as commencement of new action—Statute of limitations.—Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135, 137, distinguishing Union Pac. R. Co. *v.* Wyler, 158 U. S. 285, 39 L. Ed. 983, 15 S. Ct. 817.

22. Same—Same.—Hall *v.* Louisville, etc., R. Co. (C. C.), 157 Fed. 464.

easy to follow;[23] but however this may be, it must be conceded that under the doctrine of the Wulf Case an amendment which merely changes the capacity in which the plaintiff sues is entirely permissible and relates back to the beginning of the action, and that the decision of the Hall Case and any similar case must be considered as governed by its ruling authority.

Doctrine as to Nonsuit.—As regards a nonsuit, it has been held that where, at the time of the dismissal of an action to enforce an alleged common-law liability for the death of a railway employee, it was within the discretion of the court to dismiss the entire action without prejudice, it was equally within the court's power to dismiss without prejudice to the commencement of a new action to recover for decedent's death under the federal act.[24]

As to whether a judgment in the case as brought—that is, where the plaintiff does not suffer a nonsuit nor effect an amendment changing the capacity in which he sues—can be pleaded in bar of another action depends upon principles now to be considered.

Former Judgment as Res Adjudicata.—As it is impracticable in an article of this kind to enter into a general discussion of the subject of res adjudicata, or estoppel by former judgment, we can not do better than to give the holding of the Supreme Court of the United States in a very recent case which arose under the Act of April 22, 1908, as amended by the Act of April 5, 1910. In the case in question, the suit was originally brought by the widow and surviving children of the deceased seeking a recovery under the state law, and the question at issue was whether a judgment rendered in that suit as brought was a bar to a subsequent action brought by the widow as administratrix, for the benefit of herself and the said children, against the same defendant, under the federal act. The Circuit Court of Appeals,

23. Distinctions as to amendments introducing new cause of action.—See Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 35; Union Pac. R. Co. *v.* Wyler, 158 U. S. 285, 39 L. Ed. 983, 15 S. Ct. 817; Winfree *v.* Pac. R. Co., 227 U. S. 296, 57 L. Ed. —, 33 S. Ct. —, affirming 173 Fed. 65; Troxell *v.* Delaware, etc., R. Co., 227 U. S. 434, 57 L. Ed. —, 33 S. Ct. —, reversing 200 Fed. 44.

24. Doctrine as to nonsuit.—Oliver *v.* Northern Pac. R. Co. (D. C.), 196 Fed. 432.

reversing the lower court, was of the opinion that it was, upon the ground that the parties were essentially the same in both actions. The Supreme Court of the United States, in reversing the Circuit Court of Appeals, laid down the governing principles as follows, quoting from the syllabus and the opinion:

"Where the second suit is upon the same cause of action set up in the first suit, an estoppel by judgment arises in respect to every matter offered or received in evidence or which might have been offered to sustain or defeat the claim in controversy; but where the second suit is upon a different claim or demand, the prior judgment operates as an estoppel only as to matters in issue or points controverted and actually determined in the original suit.

"To work an estoppel, the first proceeding and judgment must be a bar to the second one because it is a matter already adjudicated between the parties, and there must be identity of parties in the two actions.

"A suit for damages for causing death brought by the widow and surviving children of the deceased under the state law is not on the same cause of action as one subsequently brought by the widow as administratrix against the same defendant under the Employers' Liability Act, and the judgment dismissing the complaint in the first action is not a bar as res judicata to the second suit."[25]

In other words, the fact that the plaintiff attempted to recover under the state law and pursued the supposed remedy until the court adjudged that it never existed would not of itself preclude the subsequent pursuit of a remedy for relief to which in law she is entitled under the federal act; neither were the parties in the second case identical or essentially the same as those in the first, for, said the court:

"Whether the plaintiff could recover under the Pennsylvania statute was not involved in the second action, and the plaintiff's right to recover because of the injury occasioned by the negligence of the fellow servants was not involved in or concluded by the first suit. Furthermore, it is well settled that to work an estoppel by judgment there must have been identity of parties in the two actions. * * *[26] The Circuit Court of Appeals in

25. Former judgment as res adjudicata.—Troxell *v.* Delaware, etc., R. Co., 227 U. S. 434, 57 L. Ed. —, 33 S. Ct. —, reversing 200 Fed. 44.

26. Citing Brown *v.* Fletcher's Estate, 210 U. S. 82, 52 L. Ed. 966, 28 S. Ct. 702; Ingersoll *v.* Coram, 211 U. S. 335, 53 L. Ed. 208, 29 S. Ct. 92.

the present case, while recognizing this rule, disposed of the contention upon the ground that the parties were essentiallv the same in both actions—the first action was for the benefit of Lizzie M. Troxell and the two minor children, and the present case, although the action was brought by the administratrix, is for the benefit of herself and children—and held that, except in mere form, the actions were for the benefit of the same persons and therefore the parties were practically the same; and that the omission to sue as administratrix was merely technical and would have been curable by amendment. This conclusion was reached before this court announced its decision in American R. Co. *v.* Birch, 224 U. S. 547, 56 L. Ed. 879, 32 S. Ct. 603. That action was brought under the Federal Employers' Liability Act by the widow and son of the decedent and not by the administrator. The lower court held that the requirement of the act that the suit should be brought in case of death by the personal representative of the deceased did not prevent a suit in the name of the persons entitled to the benefit of the recovery. In other words, the court ruled, as did the Circuit Court of Appeals in this case, that where it was shown that the widow and child were the sole beneficiaries, they might maintain the action without the appointment of a personal representative. This court denied the contention and held that congress, doubtless for good reasons, had specifically provided that an action under the Employers' Liability Act could be brought only by the personal representative, and the judgment was reversed without prejudice to the rights of such personal representative. We think that under the ruling in the Birch Case there was not that identity of parties in the former action by the widow and the present case, properly brought by the administratrix under the Employers' Liability Act, which renders the former suit and judgment a bar to the present action."[27]

Suit by Foreign Personal Representative.—Where there is a state statute which, ex vi termini, or as construed by the courts of that state, authorizes a foreign personal representative to sue in the courts of that state upon a cause of action for death by wrongful act, there can be no doubt as to the right of such a representative to maintain such a suit upon a cause of action arising under the Federal Employers' Liability Act.[28]

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27. Same.—Troxell *v.* Delaware, etc., R. Co., 227 U. S. 434, 444, 57 L. Ed. —, 33 S. Ct. —, reversing 200 Fed. 44. See, also, the same case below, 185 Fed. 540, 183 Fed. 373, 105 C. C. A. 593, 180 Fed. 871.

28. Suit by foreign personal representative—Where authorized by statute.—Midland Valley R. Co. *v.* Le Moyne (Ark.), 148 S. W. 654.

In the case cited, the injury occurred in Oklahoma and the suit was brought in a state court in Arkansas. It did not appear, said the Arkansas court, whether the plaintiff, who had taken out original letters of administration in Oklahoma and ancillary letters in Arkansas, sued by virtue of the Oklahoma appointment or under authority of the letters ancillary; but it was expressly held that the point was immaterial, since under the Arkansas statutes as construed by the courts of that state she was entitled to sue by virtue of either appointment. It is but fair to say, however, that the point that the action arose under and was controlled by the federal act was not raised until afterward upon rehearing, and that the right of the plaintiff to maintain the action was not brought in question upon such rehearing.[29]

As a question of general law, the right of a foreign personal representative to maintain in the courts, state or federal, of another state an action for death by wrongful act is very uncertain and dependent in any particular case upon principles not within the range of this discussion. Any one making an examination of the cases on the subject is apt to find that any supposed line of cleavage will lead him through a maze of obscure distinctions, only to be in the end entirely obliterated by conflicting decisions. Suffice it to say that the weight of authority is against the existence of any such right upon the part of a foreign representative in cases of wrongful death, except as given by statute. To any one interested in an investigation of the subject, however, the cases cited in the note are sufficient to give a line upon most of the others.[30]

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29. Same.—Midland Valley R. Co. *v.* Le Moyne (Ark.) 148 S. W. 654, 662.

30. Right of foreign representative to sue in absence of statute.—Dennick *v.* Railroad Co., 103 U. S. 11, 26 L. Ed. 439; Sanbo *v.* Union Pac. Coal Co. (C. C.), 130 Fed. 52; Dodge *v.* North Hudson (C. C.), 177 Fed. 986; Cornell Co. *v.* Ward, 93 C. C. A. 473, 168 Fed. 51, 52; Baltimore, etc., R. Co. *v.* Evans (C. C. A.), 188 Fed. 6; St. Bernard *v.* Shane (D. C.), 201 Fed. 453; St. Louis, etc., Co. *v.* Graham, 83 Ark. 61, 102 S. W. 700; Hall *v.* Southern R. Co., 146 N. C. 345, 59 S. E. 879; S. C., 62 S. E. 899; Low Moor Iron Co. *v.* La Bianca, 106 Va. 83, 55 S. E. 532; Robertson *v.* Chicago, etc., R. Co., 122 Wis 66, 99 N. W. 433, 66 L. R. A. 919.

As to cases arising under the federal act, it is the opinion of the writer, given for what it is worth, that the principles laid down as governing the right of a foreign representative to sue, in the absence of statutory authority, upon a right of action for wrongful death arising under a state statute, are inapplicable, and that under the federal act the personal representative has the right to sue in any proper venue and in any proper court, state or federal, without regard to whether it be in the state or jurisdiction in which he qualified as such representative or not. This conclusion is based, first, upon the general supremacy and controlling authority of the federal act as an expression of the constitutional right of congress to create the right of action and confer it upon whom it saw fit; second, upon the nature of the right conferred upon the personal representative, the cause of action being, not for the benefit of the estate, but for the benefit of certain surviving relatives and next of kin, thus harmonizing with the distinction made in many cases which permit suits to be brought by foreign representatives where they sue otherwise than in their strict representative capacity and for the benefit of the estate.

The writer confesses however, that he has found but one case arising under the federal act which involved the right of the personal representative to sue in a foreign jurisdiction in the absence of a state statute conferring the privilege. In Brooks *v.* Southern Pacific Railway Company, which arose under the Act of June 11, 1906, it appeared that the deceased, who had his domicil in the state of Kansas, was employed as a fireman by the defendant railway company and was killed in an accident in the course of his employment upon an interstate train of said company in the state of Nevada. The mother of the deceased qualified as his administratrix in the state of Kansas, and brought suit against the defendant in the Federal Circuit Court in the Western District of Kentucky, the defendant being a Kentucky corporation. The court held that while there were some cases which seemed to support the contention that a personal representative qualified in one state could not sue in the courts of another state without authority from such other state, yet in order that the plaintiff might have a remedy which could be enforced

against the corporation, which had no residence in the state of the plaintiff's domicil, it would, for the purpose of a suit based on the act of congress, treat the plaintiff as the personal representative of the deceased within the purview of the act and entitled to sue in that jurisdiction. But as the court further held the act to be unconstitutional upon various grounds set forth in the opinion, thus remitting the parties to such rights and liabilities as they might have under the state statutes and decisions, it recurred to this point, and proceeded to hold that, independently of the federal act, which it deemed to be invalid, a personal representative qualified in one state could not sue in another state without authorization by the latter, and that as the Kentucky statute authorizing suits to recover *debts* by foreign personal representatives could not be invoked in support of an action to recover damages for a *tort,* the plaintiff had no standing to maintain the suit in that state. The significant point in the whole case is that the court was of the opinion that, had the Act of June 11, 1906, been constitutional, the personal representative could have maintained the suit in the foreign jurisdiction even in the absence of any state statute conferring the privilege in that class of cases.[31]

c. For Whose Benefit.—Both the Act of April 22, 1908, and the amendment of April 5, 1910, adding § 9, provide that the action given shall be, not for the benefit of the estate, but for the benefit "of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee."[32] It is well settled that this provision, like all others

31. Same—In cases arising under the Federal Act.—Brooks *v.* Southern Pac. Co. (C. C.), 148 Fed. 986.

32. For whose benefit action given.—See the Act of April 22, 1908, and amendment of April 5, 1910. See, also, the following cases: Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002, 1004; St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, 57 L. Ed. 703, 33 S. Ct. —, Adv. S., 57 L. Ed. 703, 704; Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 67, 68, 57 L. Ed. 192, 33 S. Ct. 192; American R. Co. *v.* Didricksen, 227 U. S. 145, 149, 57 L. Ed. 224; Gulf, etc. R. Co. *v.* McGinnis, 228 U. S. 173, 175, 57 L. Ed. 426, 33 S. Ct. 426; Thomas *v.* Chicago, etc., R. Co. (D. C.), 202 Fed. 766.

of the act, is exclusive in all cases in which the act applies, and that the distribution of damages recovered for the death of an employee resulting from injuries sustained while engaged in interstate commerce is governed by this provision of the federal act, any state law upon the subject to the contrary notwithstanding.[33]

Existence of Beneficiaries in One Class as Excluding Other Classes.—By the federal statute the cause of action is given, in case of the death of the employee, to the personal representative of the deceased, for the benefit of the surviving widow or husband and children of the employee, if there be such persons, to the exclusion of the other beneficiaries named therein.[34] In other words, under the federal statute, if there be persons of the first class mentioned therein, all the persons of the second and third class are excluded, and no cause of action is given for their benefit for any damages which may have resulted to them on account of the death of the employee.[35]

Thus where a brakeman, who received fatal injuries from being thrown from the top of a car en route to another state, left a wife and child surviving, his dependent mother had no right of action against the railroad company, the right of action in such case being controlled by the federal act which gives a right of action to the parents for the wrongful death of an employee only when he leaves no wife or child surviving.[36] And in another case, in which the parties attempted to proceed in accordance with the state law and sued in their individual ca-

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33. **Same—Exclusive operation of this provision.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; Bradbury *v.* Chicago, etc., R. Co., 149 Iowa 51, 128 N. W. 1, 6; Rich *v.* St. Louis, etc., R. Co. (Mo. App.), 148 S. W. 1011, 1014; Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002; St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. S., 57 L. Ed. 703, 33 S. Ct. —; Thomas *v.* Chicago, etc., R. Co. (D. C.), 202 Fed. 766.

34. **Existence of beneficiaries in one class as excluding other classes.**—St. Louis, etc., R. Co. *v.* Geer (Tex. Civ. App.); 149 S. W. 1178, 1180.

35. **Same.**—St. Louis, etc., R. Co. *v.* Geer (Tex. Civ. App.), 149 S. W. 1178, 1180.

36. **Parents excluded where wife or child survives.**—St. Louis, etc., R. Co. *v.* Geer (Tex. Civ. App.), 149 S. W. 1178.

pacities, the Supreme Court of the United States, holding that the employee was engaged in interstate commerce at the time of his injury and that the action should have been brought by the personal representative in accordance with the federal act, said:

"Two of the plaintiffs, the father and mother, in whose favor there was a separate recovery, are not even beneficiaries under the federal statute, there being a surviving widow; and she was not entitled to recover in her own name, but only through the deceased's personal representative, as is shown by the terms of the statute and the decisions before cited."[37]

Dependency and Pecuniary Expectation of Beneficiaries.—As a matter of mere grammatical construction, there can be no doubt that what is known as the "dependency clause" or requirement of the statute applies in terms solely to those beneficiaries coming within the third class, the language of the Act of April 22, 1908, both in the original (§ 1) and in the Amendment of April 5, 1910 (§ 9), being: "to his or her personal representative, for the benefit of the surviving widow or husband of and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such an employee," etc. But the Supreme Court of the United States, disregarding the grammatical construction of the act, holds that, in its distinguishing features, it is essentially identical with Lord Campbell's Act, and that like that act, it must be construed as awarding damages for pecuniary loss only, and that in order to enable any beneficiary in any class to share in the damages recovered, it must appear that there was some dependency, or some reasonable expectation of pecuniary assistance or support of which such beneficiary has been deprived, and that the recovery must be limited to compensating only those who have sustained such pecuniary loss.[38]

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37. Same.—St. Louis, etc., R. Co. *v.* Seale, 229 U. S. —, Adv. S., 57 L. Ed. 651, 653, 33 S. Ct. —.

38. Dependency and pecuniary expectation of beneficiaries.—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 70, 33 S. Ct. 192, 195, 57 L. Ed. —; Gulf, etc., R. Co. *v.* McGinnis, 228 U. S. 713, Adv. S., 57 L. Ed. 426, 33 S. Ct. —. See, also, American R. Co. *v.* Didrickson, 229 U. S. —, 57 L. Ed. —, 33 S. Ct. 224, 225.

These cases overrule the construction placed upon the act in a dictum by the Supreme Court of Montana, wherein it was said: "By

The application of this construction of the statute is strikingly shown in the McGinnis Case, in which the action was originally brought in a state court of Texas under the Federal Act of April 22, 1908, by the administratrix of McGinnis for the benefit of his widow and four surviving children; the widow suing as administratrix for the benefit of herself and the four children named in the petition. It appears from the report of the case that one of the surviving children was Mrs. Nellie Sanders, a married woman residing with and maintained by her husband. There was neither allegation nor evidence that Mrs. Sanders was in any way dependent upon the decedent, nor that she had any reasonable expectation of any pecuniary benefit as a result of a continuation of his life. The court was requested to instruct the jury that it could not find any damages in favor of Mrs. Sanders, but this it declined to do. On the other hand, the jury were instructed that, if they found for the plaintiff, to return a verdict for such a sum as would justly compensate the persons for whose benefit the suit was brought for such pecuniary benefits as they might believe from the evidence any of the beneficiaries had a reasonable expectation of receiving from the deceased, if his death had not been so occasioned. They were further told to find a round sum in favor of the plaintiff and then apportion that sum among all the persons for whom the suit had been brought, and to state in their verdict, "how much, if anything, you find for each of said persons." The jury returned a verdict for $15,000, and apportioned it, one-half to the widow and the remainder equally among the four children, including Mrs. Sanders.

The Texas Court of Civil Appeals upheld this ruling, saying that the federal statute expressly authorized a suit to be brought by the personal representative for the benefit of the surviving wife and children of the deceased, irrespective of whether they were dependent upon him, or had the right to expect any pecuni-

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the very terms of the statute, the heirs or next of kin, other than those who stood in the relation of husband, wife, children, or parents, are not beneficiaries unless they were dependent upon the decedent during his lifetime." Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002, 1004.

ary assistance from him.[39] In reversing this judgment of the Texas Court of Civil Appeals, the United States Supreme Court held, that as Mrs. Sanders was not shown to be in any way dependent upon her father (the decedent) nor to have had any reasonable expectation of any pecuniary benefit resulting from a continuation of his life, she was not entitled to share in the recovery, nor should any recovery have been had upon her account in the absence of such a showing.[40]

Recovery Not for Equal Benefit of Beneficiaries.—It follows from what has just been said, and is expressly so held, that the action brought under the statute by the personal representative is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought, and that though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual loss, the jury making the apportionment and excluding all recovery in behalf of such as show no pecuniary loss.[41]

Character of Expectation or Dependency.—The McGinnis Case undoubtedly establishes that there can be no recovery, even on the part of a child, where there was no dependency and no reasonable expectation of pecuniary benefits resulting from a continuance of the life of the deceased employee. The question then arises as to the character of the expectation which the beneficiary must have had, and the character of the obligation, if any, resting upon the deceased to render pecuniary aid to such beneficiary, had he (the deceased) continued to live. On this point it was held in the case of Michigan Cent. R. Co. *v.* Vreeland, in which the action was brought by the personal representative for the benefit of the widow of the deceased, that the pecuniary loss recoverable under the Act of April 22, 1908, by one dependent upon the employee wrongfully killed must be a loss which can be measured by some standard,

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39. See 147 S. W. 1189.

40. Application of principle; excluding child who was not dependent.—Gulf, etc., R. Co. *v.* McGinnis, 228 U. S. 173, Adv. S., 57 L. Ed. 426, 33 S. Ct. —.

41. Recovery not for equal benefit of beneficiaries.—Gulf, etc., R. Co. *v.* McGinnis, 228 U. S. 73, Adv. S., 57 L. Ed. 526, 33 S. Ct. —.

and that it does not include an inestimable loss, such as that of the society and companionship of the deceased, or of care and advice in case of a husband for his wife; but that: "The pecuniary loss is not dependent upon any *legal* liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived."[42]

Effect of Separation or Divorce on Rights of Widow as Beneficiary.—That a wife was temporarily separated from her husband at the time he was killed while in defendant's employ does not affect her right to recover damages under the Employers' Liability Act for his wrongful death.[43]

Existence of Beneficiaries a Jurisdictional Fact.—The existence of some one or more beneficiaries answering the description of those named in the act is a jurisdictional prerequisite to the right to recover, and such fact must be alleged and proven; otherwise the court should sustain a demurrer or direct a verdict for the defendant.[44] It is true that ordinarily the presumption may be indulged that every decedent leaves heirs; but, by the very terms of the statute, the heirs or next of kin are not beneficiaries unless they were dependent upon the decedent during his lifetime, and there is no presumption that all or any of the next of kin of a decedent were so dependent upon him. The existence of a beneficiary within the description of the statute is a necessary prerequisite—an issuable fact—therefore, and must be alleged and proved.[45]

2. Time to Sue and Limitation of Actions.—The Act of June 11, 1906, limited the right of action thereunder to one

42. Character of expectation or dependency.—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 70, 57 L. Ed. 192, 33 S. Ct. 192.

43. Effect of separation or divorce on rights of widow as beneficiary. —Dunbar *v.* Charleston, etc., R. Co. (C. C.), 186 Fed. 175.

44. Existence of beneficiaries a jurisdictional fact.—Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002; Thomas *v.* Chicago, etc., R. Co. (D. C.), 202 Fed. 766.

45. Same—Allegation and proof.—Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002, 1004; Thomas *v.* Chicago, etc., R. Co. (D. C.), 202 Fed. 766.

year from the date of the injury.[46] Section 6 of the present Act of April 22, 1908, provides that no action shall be maintained thereunder unless commenced within two years from the day the cause of action accrued.

Amendment Setting Up New Cause of Action.—See ante, "To Whom Given," III, H, 1, b.

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(TO BE CONTINUED.)

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46. Time to sue and limitation of actions.—See Act Cong. June 11, 1906, c. 3073, § 1, 34 Stat. 232, U. S. Comp. St. Supp. 1907, p. 891; Winfree *v.* Northern Pac. R. Co. (C. C. A.), 173 Fed. 65.